Filed 2/15/11 P. v. Perez CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

**California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE, | |
| Plaintiff and Respondent, | G042811 |
| v. | (Super. Ct. No. 08ZF0020) |
| MARCO ANTONIO PEREZ, | O P I N I O N |
| Defendant and Appellant. | |

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed as modified.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Steven Oetting and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The indictment in this matter charged defendant Marco Antonio Perez with the murders (Pen. Code,[1] § 187, subd. (a)) of Angel Secundino (count one), Gabriel Perez (count two), attempted murder (§§ 187, subd. (a), 664, subd. (a); count three), and active participation in a criminal street gang (§ 186.22, subd. (a); count 4). It further alleged counts one, two, and three, were committed in association with a criminal street gang (§ 186.22, subd. (b)(1)) and discharge of a firearm caused great bodily injury or death (§ 12022.53, subds. (d), (e)(1)).

Defendant, a nonshooter who turned 14 years old less than four weeks before the charged incident, was convicted on all counts. The jury found the sentence enhancements true. The court sentenced defendant to 25 years to life on count one and a consecutive 25 years to life term for the discharge of a firearm for a total commitment of 50 years to life. The court then imposed concurrent sentences on each of the remaining counts. Defendant contends the 50 years to life sentence violates the state and federal cruel and unusual punishment prohibitions, and that the concurrent term imposed on the gang charge should have been stayed pursuant to section 654. We agree.

## I

## FACTS

*The Prosecution Case*

Walnut Street is a criminal street gang in Santa Ana. Prospero Guadarrama whose moniker is "Rascal," Juan Roldan ("Minor"), Norberto Hernandez ("Clumsy"), Oiram Ayala ("Menace")[2] and Angel Garcia are active members of the gang. Police seized from defendant's home photographs of defendant with Walnut Street members. One of the photographs showed six people, three of whom were Walnut Street gang

---

[1] All undesignated statutory references are to the Penal Code.

[2] Because defendant referred to each of these individuals by their respective monikers during his statement to the police, we do the same.

members. Two of the gang members were showing Walnut Street's hand sign and Menace was holding a gun. The gang expert, Matthew McLeod, testified that in his opinion defendant was an active participant in the Walnut Street gang on December 17, 2006.

On December 17, 2006, District Attorney Investigator Kevin Ruiz responded to the scene of a shooting in the 200 block of East Camile Street between Orange and Cypress Streets in Santa Ana, in the territory claimed by the Lopers Street gang. Paramedics were in the process of transporting Fernando Garcia to the hospital. He had been shot in the stomach or chest area and remained comatose for several weeks. The bodies of Gabriel Perez and Angel Segundino were on the ground. Both had been under 16 years old and each died from a single gunshot to the head. The police recovered two RP .380 automatic casings and a bullet from the scene. One casing was near Perez's body and the other was underneath it.

Less than a month after the shootings, police went to Minor's residence to arrest him. They found a loaded .38 revolver in the bathroom sink and found Minor hiding in a closet. A few weeks later, police recovered a loaded .380 automatic pistol when Clumsy dropped it while being chased. A firearms expert concluded the bullet recovered from the shooting scene had been fired from the revolver found in Minor's residence and the casings had been expended from the pistol dropped by Clumsy.

McLeod interrogated defendant the day after the shooting. After being advised of his *Miranda*[3] rights, defendant gave the following account of the shootings: On December 17, he took his father's black Chrysler without permission. He drove to Birch Street in Santa Ana where he picked up Minor, Rascal, Clumsy, and Menace at around 3:00 p.m. Clumsy sat in the front passenger seat, Menace sat behind defendant. Rascal and Minor sat in the back. Clumsy had a .38-caliber revolver in his waistband.

---

[3] *Miranda v. Arizona* (1966) 384 U.S. 436.

Minor had a gun too. The group went driving around, looking for enemies of Walnut Street. Defendant understood this to mean they would, "F. . . 'em up, blast 'em, anything." Walnut's enemies include Central Myrtle, Lopers, Townsend, and KPC. Defendant's role in backing up the others was to drive and keep an eye out for the police.

They first came upon a male walking toward First Street in the area of Myrtle and Flower Street. Defendant thought the male was a member of Central Myrtle. Rascal "hit him up" the male who said he does not "bang," so Rascal let the male go. When they came upon the male a second time, he threw a brick at them but did not hit them or the car. Rascal chased the male, firing five shots at him, all of which missed.[4] Minor reloaded and Rascal said they should go look for Lopers.

An hour later while driving in the area of Main and McFadden Streets, they saw three males they believed were Lopers. The suspected Lopers were walking in an alley. Minor told Defendant to follow them. Defendant knew "we were going to blast them." When the targets left the alley and turned to the right, defendant followed a couple of car lengths behind. He stopped the car when instructed to do so by Clumsy. Menace said he thought one of the males was Youngster, a Loper believed to have killed Slim, a Walnut gang member.

Minor, Clumsy, Menace, and Rascal got out of the car and almost encircled the three suspected Lopers. Defendant stayed in the car watching for other cars. Minor and Clumsy had guns.[5] Defendant was sure Menace did not have a gun. Rascal was there as backup. They "hit . . . up" the suspected Lopers, asking "Where you from?"

---

[4] Defendant originally said Rascal was the one who confronted and shot at the male. Defendant did not initially mention Minor's involvement that day. Toward the end of the interrogation he told the officers of Minor's presence and that it was Minor who shot at the individual they thought was from Myrtle Street. He said he did not mention Minor before because he was afraid Minor "might do something" to him.

[5] Again, defendant initially did not mention Minor and said Rascal was one of the two with a gun.

Guns were pointed at the Lopers and Menace "socked" one of them in the face. The victim of the assault did not fight back. Defendant thinks Clumsy told the Lopers to turn around. One complied. At least one of the Walnut members called out "Walnut," and Minor and Clumsy started shooting. Defendant heard three shots. The gunshots sounded different. Two were louder than the other. The Loper who turned around was shot in the back of the head by Clumsy. The three Lopers fell to the ground. Defendant drove the others from the scene and dropped them off on Walnut Street.

*The Defense Case*

1. *Hanna Escatel*

Hanna Escatel has a Ph.D. in clinical psychology. She wrote her doctoral dissertation on working with Hispanic gang members and she works four days a week, 10 hours a day, with the probation department. She provided defendant therapy on a weekly basis for about two and a half years while he awaited trial.

Ninety percent of the juveniles Escatel works with are gang members. Gang members glorify their membership. Defendant, on the other hand, has never said he was a gang member. Typically, gang members brag about their crimes, fight while in custody, throw gang signs, and put graffiti on their books, walls, and anything else they can get their hands on. Escatel has never seen defendant do any of those things. There was no graffiti in his cell. He has always been respectful and she has observed no defiant behavior on his part. He follows directions and the staff "love[s] him."

2. *Defendant's testimony*

Defendant denied being a gang member. He said he did "hang around" with Walnut Street members because he liked to "get high," but he had no desire to become a gang member. He said that in the photograph where he appears to be holding a gun, he was holding a BB gun. Gang members in juvenile hall have asked him many times where he is from and he always tells them he does not bang.

He said he lived with his father in Fontana at the time of the charged incident. His mother lived in Santa Ana. He took his father's car that day without permission so he could meet friends and smoke marijuana. He arrived at his mother's house about 12:00 noon. After getting high, he and five others "drove around" plaquing walls. Angel Garcia was one of the passengers.[6] Defendant knew his passengers were Walnut Street members.

Defendant denied intending to drive around so the others could hit up people. The others graffitied walls. He drove and never got out of the car. He said the others plaqued a wall at Flower and Myrtle Streets. They got back in the car and hit up "some guy." That person said he does not gang bang, so the others let him go. Defendant said he drove around, circled the block, and the male threw a brick at the car when they went by him again. Minor got out of the car and shot at the male. Defendant did not shoot at him. Neither did he know Minor was going to shoot at the male. Defendant was "scared." He had not known there were guns in the car. Defendant did not run because he was afraid the others would do something to him.

They ended up in the area of Main and McFadden. No one told him to drive to that area and they were not hunting for people. Defendant did not know they were in Lopers territory. One of the others said he needed urinate, so defendant turned left, into an alley and stopped. Then defendant saw three guys and a girl.[7] He had never seen them before and did not suspect them to be gang members. Someone in the car told defendant to turn right. He did as he was told. The others got out of the car. Defendant stayed in the car because he was scared and did not "want to be part of it." He was not

---

[6] We upheld Angel Garcia's convictions, including two special circumstances, in an unpublished opinion in a separate appeal. (*People v. Garcia* (Oct. 4, 2010, G042130).)

[7] Although the girl testified in Angel Garcia's trial, she did not testify in the present matter.

looking out for police and was not attempting to back up the gang.

Menace hit one of the males. Defendant then saw a hand extended and someone shooting a gun. He saw three people get shot. He did not drive away because he thought the others would do something to him. The others got back in the car and defendant drove them back to where they hang out. They told him to leave, so he went to his mother's house. Then he went to hide at the residence where he used to live.

Defendant said he was afraid during his interrogation and that only about 60 percent of what he told the police was true. He said he exaggerated and bragged about some things so his codefendants would not do anything to him. He denied being on a mission that afternoon.

## II

## DISCUSSION

### A. *Cruel and Unusual Punishment*

Defendant, who had turned 14 years old less than four weeks before these offenses, was sentenced to 50 years to life in state prison, consisting of a 25 years to life term for murder and a mandatory consecutive term of 25 years to life because a codefendant personally discharged a firearm. The trial court could have imposed a much greater minimum term, assuring that defendant would not become eligible for parole at any time during life expectancy. (See *Neal v. California* (1960) 55 Cal. 2d 11, 21 [§ 654 inapplicable to violent crimes against separate victims]; *People v. Frausto* (2009) 180 Cal.App.4th 890 [three consecutive 25-year-to-life enhancements imposed]). It appears the trial court did not do so because the defendant was not the shooter, he lacks sophistication, and has by all accounts made a very favorable adjustment while housed in juvenile hall pending trial. Defendant contends the mandatory imposition of the consecutive 25 years to life enhancement for discharge of a firearm (§ 12022.53) violates the state and federal constitutional provisions prohibiting cruel and unusual punishment. His challenges are both facial and as applied. Because the state constitutional provision

may proscribe punishments the federal clause would allow (see *In re Alva* (2004) 33 Cal.4th 254, 291 and cases cited therein), his federal and state claims are analyzed separately.

1. *Eighth Amendment Prohibition*

The Eighth Amendment prohibits cruel and unusual punishment and is made applicable to the states through the due process clause of the Fourteenth Amendment. (*Robinson v. State of California* (1962) 370 U.S. 660, 666-667.) "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that punishment for the crime should be graduated and proportioned to [the] offense.' [Citation.]" (*Graham v. Florida* (2010) __ U.S. __, __ [130 S.Ct. 2011, 2021] (*Graham*).) This proportionality review has traditionally occurred in connection with two different lines of cases. The first involves sentences for "term-of-years" and the other involves certain categorical restrictions the United States Supreme Court has placed on the imposition of the death penalty. (*Ibid*.) Examples of the latter include *Coker v. Georgia* (1977) 433 U.S. 584, 592 [execution for rape violates Eighth Amendment]; *Roper v. Simmons* (2005) 543 U.S. 551, 569 [execution of minor violates Eighth Amendment]; and *Atkins v. Virginia* (2002) 536 U.S. 304, 321 [execution of mentally retarded violates Eighth Amendment].

Until last year's decision in *Graham*, the court had not announced a categorical restriction on a term-of-years, or nondeath case. In *Graham*, the court declared that a sentence of life without the possibility of parole (LWOP) imposed on a juvenile for a nonhomicide offense violates the Eight Amendment. (*Graham*, *supra*, __ U.S. at p. __ [130 S.Ct. at p. 2021].) The high court's decision was presaged a year earlier in *In re Nuñez* (2009) 173 Cal.App.4th 709, where another panel of this court held an LWOP sentence imposed upon a juvenile defendant for kidnapping for ransom (§ 209,

subd. (a)) violated the Eight Amendment. (*Id*. at p. 738.)

*Graham* is an exception to the court's traditional Eight Amendment review of sentences not involving the death penalty. That review "contains a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.' [Citation.]" (*Graham, supra*, __ U.S. at p. __ [130 S.Ct. at p. 2021].) As a result, Eighth Amendment death penalty cases "'are of limited assistance in deciding the constitutionality of the punishment' in a noncapital case. [Citation.]" (*Solem v. Helm* (1983) 463 U.S. 277, 289.)

In performing this narrow proportionality review, the court first compares the gravity of the offense to the severity of the sentence. (*Graham, supra,* ___ U.S. at p. __ [130 S.Ct. at p. 2022].) "'[I]n the rare case in which [this] threshold comparison . . . leads to an inference of gross disproportionality' the court should then compare the defendant's sentence with the sentences received by other offenders in the same jurisdiction with the sentences imposed for the same sentence in other jurisdictions. [Citation.] If this comparative analysis 'validate[s] an initial judgment that [the] sentence is grossly disproportionate, the sentence is cruel and unusual. [Citation.]" (*Ibid.*)

a. *Facial Challenge*

Defendant's facial challenge to his sentence lacks merit. He was sentenced to a term of 50 years to life for two murders and an attempted murder, where codefendants used firearms. As defendant correctly notes, the Supreme Court in *Graham* considered a facial challenge to the sentence imposed therein, not an as applied challenge. *Graham*'s categorical prohibition was specifically limited to an LWOP sentence imposed on a juvenile for a nonhomicide offense. (*Graham, supra,* __ U.S. at p. __ [130 S.Ct. at p. 2017] ["issue before the Court is whether the Constitution permits a juvenile offender to be sentenced to [LWOP] for a nonhomicide crime"].)

While defendant asserts *Graham* did not state a categorical rule that LWOP or any other term-of-years sentence would pass a facial challenge when imposed on a juvenile convicted of a homicide, he fails to cite any authority for the proposition that a life sentence for a homicide is, on its face, an Eighth Amendment violation. There is contrary authority. LWOP, "[l]ike any other prison sentence, . . . raises no inference of disproportionality when imposed on a murderer." (*Harris v. Wright* (9th Cir. 1996) 93 F.3d 581, 585 [denying cruel and unusual punishment challenge by 15-year old].)

As the court reasoned in *Graham*, "[t]here is a line 'between homicide and other serious violent offenses against the individual.' [Citation.] Serious nonhomicide crimes 'may be devastating in their harm . . . but "in terms of moral depravity and of the injury to the person and to the public," . . . they cannot be compared to murder in their "severity and irrevocability."' [Citations.] This is because '[l]ife is over for the victim of the murderer,' but for the victim of even a very serious nonhomicide crime, 'life . . . is not over and normally is not beyond repair.' [Citation.]" (*Graham, supra,* ___ U.S. at p. __ [130 S.Ct. at p. 2027].) "Juvenile offenders who committed both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide." (*Id.* at p. _ [130 S.Ct. at p. 2023].) "[D]efendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers. [Citations.]" (*Id*. at p. __ [130 S.Ct. at p. 2027].) Thus, "while incapacitation may be a legitimate penological goal sufficient to justify life without parole in other contexts, it is inadequate to justify that punishment for juveniles who did not commit homicide." (*Id*. at p. _ [130 S.Ct. at p. 2029.)

The requirement that all sentenced juveniles have "some realistic opportunity to obtain release" in his or her lifetime regardless of the offense committed, including multiple murders cannot be read into the *Graham* decision. (*Graham, supra,* __ U.S. at p. __ [130 S.Ct. at p. 2034].) The requirement placed on the state by the Eight

Amendment is to assure all juveniles sentenced on nonhomicide crimes obtain that opportunity. (*Ibid*.) Moreover, the sentence imposed upon defendant does provide him that opportunity. The Eighth Amendment does not categorically prohibit defendant's sentence. Therefore, we deny his facial challenge to the sentence.[8]

b. *As Applied Challenge*

While a sentence may not be categorically prohibited by the Eight Amendment (i.e., subject to a facial challenge), the sentence may nonetheless violate the Eighth Amendment as applied to the defendant. (*Ewing v. California* (2003) 538 U.S. 11, 20.) "Embodied in the Constitution's ban on cruel and unusual punishment is the 'precept of justice that punishment for a crime should be graduated and proportioned to [the] offense.' [Citation.]" (*Graham*, *supra*, __ U.S. at p. ___ [130 S.Ct. at p. 2021].) "[T]hree factors may be relevant to determine whether a sentence is so disproportionate that it violates the Eighth Amendment: '(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.' [Citation.]" (*Ewing v. California*, *supra*, 538 U.S. at p. 22.) Successful as applied

[8] Because we find *Graham*'s categorical prohibition does not apply to defendant given the fact that he has been convicted of homicide, we have no occasion to address the recent decisions in *People v. Mendez* (2010) 188 Cal.App.4th 47, and *People v. Caballero* (Jan. 18, 2011, B217709) __ Cal.App.4th __ [2011 Cal.App.Lexis 41], holding *Graham*'s categorical rule does not apply to sentences of 84 years to life and 110 years to life, respectively, when imposed on juveniles in nonhomicide cases. The *Mendez* court did conclude the sentence imposed in that case violated the Eight Amendment as applied to Mendez's sentence. (*People v. Mendez*, *supra*, 188 Cal.App.4th at pp. 67-68.)

challenges under the Eight Amendment, however, are "exceedingly rare."[9] (*Rummel v. Estelle* (1980) 445 U.S. 263, 272.)

Defendant did not present evidence regarding any of the above factors in his Eighth Amendment analysis. Still the gravity of the offense and the harshness of the sentence are readily apparent. When a defendant who has been convicted of a nonhomicide offense but sentenced to a term commonly pronounced in connection with a homicide, it is not uncommon to contrast the underlying offense with murder. (See e.g. *Coker v. Georgia*, *supra*, 433 U.S. at p. 592 [comparing rape to murder].) Murder is, of course, the gravest of offenses. Defendant stands convicted of two counts of first degree murder and one count of deliberate and premeditated attempted murder. The sentence imposed in this case, 50 years to life, is by any definition severe. Only a life sentence with a greater minimum term, LWOP, or death are more severe. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 1005 (conc. opn. of Kennedy, J.) [LWOP sentence for possession of more than 650 grams of cocaine did not create an inference of disproportionality].)

In comparing the gravity of the offense with the severity of the sentence, the court does not consider the offense in the abstract. "This analysis can consider a particular offender's mental state . . . ." (*Graham*, *supra*, __ U.S. at p. ___ [130 S.Ct. at p. 2037] (conc. opn. of Roberts, C.J.).) Thus, when the particular sentence under consideration was imposed on a juvenile, it is here the defendant's age and those factors relating to his/her age are considered. (*Id.* at p.___ [130 S.Ct. at p. 2039] (conc. opn. of Roberts, C.J.).)

---

[9] For example, in *Weems v. United States* (1910) 217 U.S. 349, the court struck down a sentence of 15 years of cadena temporal imposed by a court in the Phillipines, for making a "false entry" in a public record. (*Id*. at pp. 358, 363, 382.) Cadena temporal required the person to work at hard and painful labor for the benefit of the state, while carrying a chain at the ankle and hanging from the wrist. In addition to other "accessory penalties," the defendant was denied any "'assistance whatsoever from without the institution.'" (*Id*. at p. 364.)

The question then is whether the 50 years to life sentence imposed upon a juvenile barely 14 years old at the time of the offense and who did not kill or use a weapon is "grossly disproportionate" to the crime. (*Graham*, *supra*, __ U.S. at p. __ [130 S.Ct. at p. 2021].) "The Court holds today that it is 'grossly disproportionate' and hence unconstitutional for any judge or jury to impose a sentence of life without parole on an offender less than 18 years old, *unless* he has committed a homicide." (*Id*. at p. __ [130 S.Ct. at p. 2043] (dis. opn. of Thomas, J.), italics added.) Given the decisions of the United States Supreme Court, we cannot say a sentence that provides an individual an opportunity in his life to obtain release on parole at some point in his life, should he demonstrate his suitability, is grossly disproportionate to the crimes for which defendant has been convicted: two counts of first degree murder and one count of deliberate and premeditated attempted murder. Accordingly, we deny his Eight Amendment as applied challenge.

The contention that section 12022.53's mandatory 25 years to life enhancement violates the Eight Amendment's prohibition against cruel and unusual punishment, both facially and as applied, because it is mandatory and does not allow the court to exercise its discretion in determining whether such a term should be imposed after due consideration of the juvenile's "tender age or circumstances" must be rejected. Having found the sentence in this case does not violate the federal Constitution, the fact that at least 25 years of the sentence was imposed because the statute *required* the court to mete out that portion of the sentence does not render the penalty unconstitutional. "There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is 'mandatory.' [Citation.]" (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 995.)

2. *The California Constitutional Prohibition*

"Cruel or unusual punishment may not be inflicted or excessive fines

imposed." (Cal. Const., art. I, § 17.) We approach the task of determining whether a sentence violates this constitutional provision with a full appreciation of the fact that the Legislature appropriately defines crimes and the punishment for their commission. (*In re Lynch* (1972) 8 Cal.3d 410, 414.) However, "'the final judgment as to whether the punishment it decrees exceed constitutional limits is a judicial function.' [Citations.]" (*Ibid*.) A sentence violates the state Constitution "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*Id*. at p. 424, fn. omitted.)

A sentence that does not violate the Eight Amendment cruel and unusual punishment clause may still violate our article I, section 17 of the state constitution. (See *In re Alva, supra*, 33 Cal.4th at p. 291 and cases cited therein.) For example, in *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*), the court found a sentence of 27 years to life for first degree murder cruel or unusual punishment as applied to an immature 17 year old who did not intend to kill.

"A [defendant] attacking his sentence as cruel or unusual must demonstrate his punishment is disproportionate in light of (1) the nature of the offense and the defendant's background, (2) the punishment for more serious offenses, or (3) the punishment for similar offenses in other jurisdictions. [Citation.]" (*In re Nuñez, supra*, 173 Cal.App.4th at p. 725.) Defendant does not contend the third technique applies in his case.

a. *Intrastate Comparison*

A special circumstance murder is punishable by death or life in prison without the possibility of parole. (§ 190.2, subd. (a).) Section 190.5 prohibits the imposition of the death penalty upon any minor. (§ 190.5, subd. (a).) That section also authorizes a court in the exercise of its discretion to sentence a defendant under 18 years

old at the time of the murder (but at least 16 years old, two years older than defendant was at the time of the incident in this case), to a term of 25 years to life instead of LWOP. (§ 190.5, subd. (b).) In relation to the second technique referred to in *Lynch*, comparison of punishments in the same jurisdiction for offenses that must be deemed more serious (*In re Lynch*, *supra*, 8 Cal.3d at p. 426), defendant zeroes in on the effect of section 190.5, subdivision (b). Contrasted to the court's discretion to sentence a 16 or 17 year old convicted of special circumstance murder to 25 years to life rather than LWOP, is the fact that even though defendant did not possess a weapon, section 12022.53 required the court to impose a consecutive 25 years to life term because a codefendant discharged a firearm. (§ 12022.53, subds. (d), (e)(1).)[10]

The comparison is not particularly suitable in the present situation for two reasons. First, defendant was sentenced to concurrent 25 years to life terms on two counts of murder and, had he been two years older, the multiple murder special circumstance (§ 190.2, subd. (a)(3)) could have applied, making him eligible for an LWOP sentence or 25 years to life in the court's discretion. (§ 190.5, subd. (b).) Second, defendant does not suggest that a 16 year old convicted of a special circumstance murder would not also be subject to a mandatory consecutive term of 25 years to life if section 12022.53, subdivision (d) were found true. Thus, a 16 year old convicted of a special circumstance murder would appear to be subject to sentences of LWOP plus a consecutive 25 years to life term for the firearm enhancement, or consecutive 25 years to life terms, in the court's discretion. The intrastate comparison does not help defendant's cause.

---

[10] While the statute purports to require one to "personally and intentionally discharge[] a firearm and proximately cause[] great bodily injury . . . or death" (§ 12022.53, subd. (d)), the enhancement applies to any prinicipal when the offense would otherwise be subject to enhancement pursuant to section 186.22, subdivision (b). (§ 12022.53, subd. (e)(1).)

b. *The Defendant and the Crime*

Although we find defendant's sentence does not violate the Eighth Amendment under United States Supreme Court Eighth Amendment jurisprudence, the high court's recognition of the diminished culpability of juveniles is apt here. "[A]s any parent knows and as the scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.' [Citations.]" (*Roper v. Simmons, supra*, 543 U.S. at p. 569.) Another difference between adults and juveniles "is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. [Citation.]" (*Ibid*.) "'Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. [Citation.]" (*In re Barker* (2007) 151 Cal.App.4th 346, 376.)

Additionally, the "character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. [Citation.]" (*Roper v. Simmons, supra,* 543 U.S at p. 570.) Thus, the "susceptibility of juveniles to immature and irresponsible behavior means 'their irresponsible conduct is not as morally reprehensible as that of an adult.' [Citation.] Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. [Citation.] The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, '[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities

of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.' [Citations.]" (*Ibid.*) For these reasons, society views juveniles "as 'categorically less culpable than the average criminal.'" (*Id.* at p. 567.)

As noted above, the defendant in *Dillon* was 17 years old at the time of his offense when he and seven other high school classmates armed themselves with a variety of weapons — Dillon was armed with a .22-caliber rifle — to steal marijuana being grown in a secluded area they knew was under surveillance by the grower(s). (*Dillon, supra*, 34 Cal.3d at p. 451.) During the failed attempt, defendant heard two shotgun blasts in the distance and feared a friend had been fired on by a grower. (*Id.* at pp. 452, 482.) Upon seeing one of the growers approaching with a shotgun, and feeling he was trapped, Dillon rapidly fired nine shots in the grower's (Johnson) direction, killing him. (*Id*. at pp. 482-483.) The jury found Dillon guilty of first degree murder under the felony-murder rule, although it regretted the law required it to do so. (*Id*. at pp. 484-485.) The trial court reluctantly sentenced Dillon for first degree murder. Under Board of Prison Terms regulations in effect at the time, Dillon faced a base term of 14, 16, or 18 years plus an additional two years for the use of a firearm. (*Id*. at p. 487, fn. 37.) On review, the Supreme Court found the sentence was cruel or unusual under the state Constitution, reduced the crime to second degree murder, and remanded the matter to the trial court for resentencing. (*Id*. at p. 489.)

The court found "[e]specially relevant" to its determination examination of the defendant and the crime. (*Dillon, supra*, 34 Cal.3d at p. 479.) In considering the crime, the court does not view it in the abstract. Rather, it should consider "the totality of the circumstances surrounding the commission of the offense in the case at bar, including such facts as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his act." (*Ibid*.) "Secondly, it is obvious that the courts must also view 'the nature of the offender' in the concrete rather than the abstract

. . . . This branch of the inquiry therefore focuses on the particular person before the court, and asks whether the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

There are notable differences between the facts in *Dillon* and those present here. On one side of the coin, Dillon was convicted under a felony-murder theory, which means he was liable for murder without forming an intent to kill. Defendant was convicted on a theory that he directly aided and abetted the murders. In other words, the jury found that he shared the actual killers' intent.

On the other side of the coin and more compelling, Dillon was 17 years old at the time of his crime. Had defendant been 26 days younger, he would still have been 13 years old and prosecuted as a juvenile. (Welf. & Inst. Code, § 602, subd. (a).) Moreover he would have presumptively been incapable of committing the charged offenses. (§ 26.) Dillon personally fired the fatal shot that killed Johnson, and eight other shots. Defendant did not kill anyone or fire any shots. Third, because Dillon personally used a firearm in the murder, his eligibility for parole was delayed for two additional years. Not only was defendant not armed, he received an additional 25 years to life sentence because a *codefendant* used a firearm.

"Here, it can be reasonably assumed that [defendant] was influenced by peer pressure. He did not commit his crimes alone, but with fellow gang members . . . ." (*People v. Mendez*, *supra*, 188 Cal.App.4th at p. 65.) The other gang members were all older than defendant. Norberto Hernandez, one of the shooters, was 22 years old, eight years older than defendant.[11] Defendant was not armed. Although he was not old enough to have a learner's permit, much less a driver's license, defendant's job was to

[11] We heard oral argument Hernandez's separate appeal on the same day defendant's matter was argued, and upheld Hernandez's convictions in an unpublished opinion. (*People v. Hernandez* (Jan. 21, 2011, G042193).)

drive the group in their search for enemies. When the older members spotted the rival gang members, defendant was told what to do. Minor told defendant to follow the rivals. Defendant did and stopped the car when told to do so by another member of the gang. When all the passengers alighted from the car to confront the victims, defendant, the youngest, stayed in the car to watch for other cars. A total of three shots were fired by the two shooters. Two victims were shot in the head and died. The surviving victim had been shot in the stomach.

Defendant had joined the Walnut Street gang six months earlier, when he was 13 years old, according to his sister. He was raised by an alcoholic father and "'emotionally starved' because his mother was absent." He took part in activities at a "local organization in his neighborhood," but apparently became too old to participate once he reached 12 years of age. Because he was "so needy" and was "a 'little guy who had been bullied by larger peers, neglected by his parents, and he desperately wanted to belong somewhere,'" older gang members became his surrogate family. According to Dr. Martha Rogers, the psychologist who evaluated defendant, he was a boy who was very easily influenced by more socially dominant individuals. In fact, it was this susceptibility that may have caused him to tell police what he thought they wanted him to say and to exaggerate his premeditation or planning in this case.

According to psychological testing, defendant did not evidence any disorder seen in youths who are more likely to evolve into psychopathic or antisocial personality disorders. In fact, "his overall score on this factor was *much lower than most juveniles*." (Italics added.)

Defendant admits seeking to please older gang members, but now views his past behavior as "really stupid." According to Dr. Rodgers, his views matured in the years since his arrest; he began to develop his values and goals, and possesses a better sense of himself since detention.

Defendant received weekly psychotherapy sessions with Dr. Hanna Escatel in the two and one-half years between his arrest and sentencing. Dr. Rodgers concluded defendant's response to the therapy was "uncommonly good" and that he had "good potential for living a productive, non-criminal lifestyle." Dr. Rodgers stated defendant had "'come light years' since his detention.'" She thought defendant was a "good candidate" for a commitment for rehabilitation through the California Youth Authority and should be committed to the Division of Juvenile Justice.

Dr. Escatel said defendant held a position at juvenile hall that was a "big deal" and required him to serve and work with other detainees. He worked well with probation staff and never fought, incurred violations, or received any "write-ups." Defendant's attorney informed the probation officer who prepared the sentencing report that defendant read an average of three books a week while in juvenile hall — he read over 300 books — and received his high school diploma, although he had dropped out of school prior to his arrest. He said Dr. Escatel, someone who works at juvenile hall 10 hours a day, four days a week, informed him that defendant was one of the best behaved minors she has ever seen and that the staff at juvenile hall say he is a "great kid," well behaved, and that they "love him."

Defendant was a vulnerable and immature child when the incident occurred. He has no prior convictions or juvenile adjudications. His development, continued maturation, and insight demonstrate, at least as of the time of his sentencing, he is not irredeemable and locking him away without the hope of ever being able to demonstrate the character necessary to be *considered* for parole prior to having spent 50 years of his life in prison for killings he did not personally commit is cruel or unusual punishment given the facts of his case. Serious punishment for the offenses for which he stands convicted must be obtained. A sentence of 25 years to life, the penalty for first degree murder, is a severe penalty by any account. Such a sentence does not mean defendant will not serve the rest of his life in prison. However, considering his extreme

youth and his commendable maturation in the years after his arrest and prior to sentencing, a sentence that does not provide him even the glimmer of hope of effectively demonstrating his suitability for release until he is in his mid-60's is cruel or unusual punishment.

B. *Section 654*

In addition to the findings that each offense was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)) and that defendant vicariously used a firearm (§ 12022.53, subd. (d)), which also required the jury to find the crimes were committed in violation of section 186.22, subdivision (b)(1), the jury convicted defendant of being an active gang participant (§ 186.22, subd. (a); count four) on the date of the murders. The court imposed a two-year concurrent prison term on count four. Defendant argues the sentence imposed on that count should have been stayed pursuant to section 654.

Section 654, subdivision (a), provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." "'Section 654 has been applied not only where there was but one "act" in the ordinary sense . . . but also where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654.' [Citation.] [¶] Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one. (*Neal v. State of California*, *supra*, 55 Cal.2d at p. 19.)

Whether section 654 applies is generally a question of fact. (*People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5.) Thus, except in cases of "the applicability of the statute to conceded facts," (*People v. Harrison* (1989) 48 Cal.3d 321, 335) "the trial court's finding will be upheld on appeal if it is supported by substantial evidence. [Citations.]" (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.)

In addition to evidence of the murders and the attempted murder committed in Lopers territory, there was evidence of an earlier incident where one of the gang members in defendant's group shot at someone thought to belong to Central Myrtle, another enemy of Walnut Street. The shooting was not charged in the indictment. Had the jury found defendant to have been an active gang participant based upon that shooting, we would have to conclude section 654 was not implicated by a sentence imposed on the gang count, there having been no punishment imposed for *that* shooting. The record, however, does not permit such an inference. In arguing count four to the jury, the prosecutor urged the jury "that if you have found [defendant] guilty of counts one, two, and three you don't even need to worry about this third element because you've already found him to be an aider and abettor, so that's finished." Thus, the guilty verdict on the substantive gang offense was based upon the murders and the attempted murder, offenses for which the court did impose punishment.

Germane to the present issue, the court instructed the jury pursuant to CALCRIM No. 1400 that to convict defendant of the gang offense it must find: "1. A member of the gang committed the crime; [¶] 2. The defendant knew that the gang member intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the gang member in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the commission of the crime." The murders and the attempted murder were all committed for one and the same reason: each victim was a perceived "enemy" of the Walnut Street gang and defendant and his passengers were out hunting enemies. There was no other motive

involved. The court not only punished defendant for aiding and abetting the murders and the attempted murder, it also punished him for the vicarious gun use enhancements based upon his aiding and abetting the other gang members in shooting the victims. "In resolving section 654 issues, our California Supreme Court has recently stated that the appellate courts should not 'parse[] the objectives too finely.' (*People v. Britt* [(2004)] 32 Cal.4th [944,] 953.)" (*People v. Lopez* (2004) 119 Cal.App.4th 132, 138.)

A number of cases have considered whether a defendant may be punished for a substantive gang offense and a felony the commission of which is required in order to obtain a conviction on the substantive gang offense. The cases have reached various results. (See e.g., *People v. Sanchez* (2009) 179 Cal.App.4th 1297, 1309-1316; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1032-1034; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 935; *In re Jose P.* (2003) 106 Cal.App.4th 458, 468-471; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1465-1468.)

As instructed in the present matter, the gang offense required defendant to have aided and abetted gang members in committing a felony. Defendant was found guilty of two counts of murder and one count of attempted murder, as well as the gang offense, based upon the very same act of aiding and abetting. He may be punished for each of the violent crimes (the murders and the attempted murder) based upon the same act because section 654 does not apply to violent crimes involving separate victims. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) He cannot, however, also be punished for the gang offense based upon the same act. The murders, the attempted murder, and the substantive gang count were all committed by defendant by the same act and with the same intent. The sentence imposed on count four must be stayed pursuant to section 654.

## III

## DISPOSITION

The judgment is modified, as follows: The consecutive terms of 25 years to life imposed pursuant to section 12022.53, subdivisions (d) and (e)(1), on counts one, two, and three are stricken. This results in a 25 years to life sentence on count one, a concurrent 25 years to life term on count two, and a concurrent life term on count three. The two-year term imposed on count four is ordered stayed pursuant to section 654. The total sentence is 25 years to life. The judgment as thus modified is affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward certified copies of it to the Department of Corrections and Rehabilitation.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.